D 95-617

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ELIZABETH G. CURTIS, *et al.*

Petitioners,

v.

SCHOOL COMMITTEE OF FALMOUTH, *et al.*

Respondent.

Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A School District adopted a policy making condoms available to students in grades seven through twelve. Seventh through twelfth grade students may obtain condoms from the school nurse at no charge. Ninth, tenth, eleventh and twelfth grade students can also purchase condoms for seventy-five cents from vending machines installed in bathrooms in the school. The school condom policy does not require parental consent and does not permit objecting parents to "opt out" of the program. Petitioners (parents and students) filed suit challenging the condom policy. The Supreme Judicial Court of Massachusetts rejected petitioners' constitutional challenge, holding that there was no "burden" on petitioners' rights.

1. Did the Supreme Judicial Court of Massachusetts err by holding, in square conflict with a decision of a New York appellate court, that public school provision of condoms to unemancipated minor students without parental consent and despite parental objections is constitutional?

2. Did the Supreme Judicial Court of Massachusetts err by holding that public school provision of condoms to unemancipated minor students without parental consent and despite parental objections does not burden parental rights?

PARTIES

The following persons were appellants in the proceedings below and are petitioners in this Court:

Elizabeth G. Curtis, by her next friend, Carol Curtis, Carol Curtis, Daniel MacLone, by his next friend, Nancy MacLone, Nancy MacLone, Eugene Bradeen, Alice Bradeen, Bryan Peltzer and Matthew Peltzer, by their next friend, Beverly Peltzer, Beverly Peltzer, and Edward Peltzer.

The following persons were appellees in the proceedings below and are respondents in this Court:

The School Committee of Falmouth, Suzanne McGee, in her official capacity as Superintendent, Howard Campbell, individually and in his official capacity, and Donald Freeman, individually and in his official capacity.

None of the petitioners in this case is a corporation. *See* Rule 29.1.

TABLE OF CONTENTS

Page

Questions Presented i
Parties ii
Table of Authorities iv
Decisions Below 1
Jurisdiction 1
Constitutional Provisions 2
Statement of the Case 3
Reasons for Granting the Writ 6
I. The Decision below Conflicts with a Decision of the New York State Appellate Division 6
II. This Case Presents a Precise and Important, but Unsettled, Question of Constitutional Law 7
Conclusion 10

Appendix to the Petition

A. Decision, Supreme Judicial Court of Massachusetts (July 17, 1995) 1a
B. Decision, Superior Court of Massachusetts, Case No. 92-518 (October 7, 1993) 20a
C. Judgment, Superior Court of Massachusetts, Case No. 92-518 (October 8, 1993) 35a

TABLE OF AUTHORITIES

Page(s)

CASES

Alfonso v. Hernandez, 195 A.D.2d 46, 606 N.Y.S.2d 259 (1993), *leave to appeal dismissed*, 83 N.Y.2d 906, 637 N.E.2d 279 (N.Y. 1994) 6-7
Curtis v. School Committee of Falmouth, 420 Mass. 749, 652 N.E.2d 580 (1995) ..... 1, *passim*
Employment Division v. Smith, 494 U.S. 872 (1990) 9
Lee v. Weisman, 112 S. Ct. 2649 (1992) 8
Meyer v. Nebraska, 262 U.S. 390 (1923) 9
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 9
Wisconsin v. Yoder, 406 U.S. 205 (1972) 9

CONSTITUTIONAL and STATUTORY PROVISIONS

U.S. Const. amend. I ..... 1, *passim*
U.S. Const. amend. XIV, § 1. ..... 1, *passim*
28 U.S.C. § 1257(a) 2
M.G.L.A. c. 76 § 1 3
M.G.L.A. c. 76 § 2 3
M.G.L.A. c. 76 § 20 3

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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The decision of the Supreme Judicial Court of Massachusetts, which is reported as *Curtis v. School Committee of Falmouth*, 420 Mass. 749, 652 N.E.2d 580 (Mass. 1995), is reproduced below as Appendix A at 1a. The trial court's memorandum of decision and order and its judgment, which were not reported, are reproduced in Appendices B and C, at 20a and 35a, respectively.

JURISDICTION

The Supreme Judicial Court of Massachusetts entered its

decision in this case on July 17, 1995. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The first amendment to the United States Constitution provides as follows:

> Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person with its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

With certain exceptions not pertinent here, Massachusetts compels all its minor children to be in attendance, regularly, at school. M.G.L.A. c. 76 § 1. Parents who fail to cause their children to be in regular attendance at school are subject to fine. M.G.L.A. c. 76 § 2. Children not in regular attendance in school in Massachusetts may be taken in custody on sight by attendance supervisors, without any warrant, and transported to school. M.G.L.A. c. 76 § 20.

Petitioners include the parents of public school students who attend schools that are under the direction and control of the Falmouth School Committee. Petitioners also include certain children of these parents. At the time this lawsuit was filed, each of these children was an unemancipated minor. At least some of these children remain unemancipated minors. The Peltzers, Bradeens, and MacLones reside within the Falmouth School District (hereafter, "FSD"). Carol and Elizabeth Curtis live in Mashpee, Massachusetts, outside the FSD. Students residing in Mashpee attend FSD schools, however, under a contractual agreement between the Mashpee School Committee and the Falmouth School Committee. App. 5a.

During autumn, 1991, the Falmouth School Committee held a series of hearings to consider adopting a policy making condoms available to students in junior and senior high schools. Public opposition to the proposed policy was overwhelming. Nonetheless, in November, 1991, the Falmouth School Committee voted to adopt a policy by which

its employees would distribute condoms to students for free, or make them available for purchase, without parental consent and despite parental objections. App. 5a.

According to the FSD policy, the school nurse at Lawrence Junior High School and Falmouth High School keeps a supply of condoms to give, at no charge, to students who request them. The nurse or other distributor may explain to students requesting condoms the use of the devices and give the students pamphlets about AIDS/HIV. FSD ordered the nurses and other distributors, however, not to express to students their opinions about the condom program. In addition, the FSD installed condom vending machines in the boys' and girls' restrooms at Falmouth High School. At these machines, students could purchase condoms at $.75 each. FSD installed the condom vending machines in the restrooms of the high school during December, 1991, and the condom program was fully in effect on January 2, 1992. App. 22a.

Students attending Lawrence Junior High School range in age from 11 years to 16 years. Without parental knowledge or permission, and indeed despite express parental objections, the school nurse or other school distributor may give these students condoms and instructions on the use of them. The FSD policy does not include any mechanism for enforcing or respecting parental instructions or objections regarding the distribution of condoms to their children. FSD does not provide any "opt-out" procedure for the condom program. App. 5a.

Petitioners filed suit in Massachusetts superior court seeking declaratory and injunctive relief. In their amended

complaint, petitioners challenged the FSD condom policy as violative of both the parental right to direct the upbringing of children and the right to the free exercise of religion.[1] The complaint named as defendants (respondents here) the Falmouth School Committee, the FSD superintendent, and the principals of the junior high and high schools.

The superior court granted summary judgment for respondents. Rejecting the petitioners' federal claims, the superior court held that the condom program "is not coercive of plaintiffs' constitutionally protected rights of privacy and free exercise and, therefore, plaintiffs have failed to make a threshold showing of a constitutional violation of the First and Fourteenth Amendments." App. 31a.

The Supreme Judicial Court of Massachusetts granted direct review and affirmed. App. 1a. Agreeing with the superior court, the state supreme court held that the condom program "is in all respects voluntary and in no way intrudes into the realm of constitutionally protected rights." App. 5a-6a. Perceiving "no threshold demonstration of a coercive burden," the state supreme court affirmed the grant of summary judgment for respondents. App. 6a.

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1. Petitioners also challenged the condom policy on state grounds not pertinent here.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE NEW YORK STATE APPELLATE DIVISION.

Two state courts have finally adjudicated the precise federal constitutional issue presented here. Those courts have reached directly opposite conclusions. This Court should grant review to settle that conflict.

In *Alfonso v. Hernandez*, 195 A.D.2d 46, 606 N.Y.S.2d 259 (1993), *leave to appeal dismissed*, 83 N.Y.2d 906, 637 N.E.2d 279 (N.Y. 1994), a divided five-judge panel of the New York Supreme Court, Appellate Division, struck down a public school condom distribution program indistinguishable from the respondents' condom program. As in the present case, the New York City policy in *Alfonso* directed schools to provide condoms to those students who requested them. "Most importantly, this . . . program d[id] not include a provision for parental consent or opt-out." 195 A.D.2d at 49, 606 N.Y.S.2d at 261.

The *Alfonso* court held that the condom policy violated the parental right to rear children as they see fit.

> Through its public schools the City of New York has made a judgment that minors should have unrestricted access to contraceptives, a decision which is clearly within the purview of the petitioners' constitutionally protected right to rear their children, and then has forced that judgment on them.

Id. at 57-58, 606 N.Y.S.2d at 266. Because parents "must send

their children to school," *id.* at 56, 606 N.Y.S.2d at 266, the *Alfonso* could held that there was "State compulsion on parents to send their children into an environment where they had unrestricted access to free contraceptives," *id.* at 57, 606 N.Y.S.2d at 266.

The state supreme court in the present case reached exactly the opposite result. Noting and rejecting the *Alfonso* majority, App. 11a-12a, the Massachusetts high court held that "'compulsion is totally absent here,'" App. 12a (quoting the dissent in *Alfonso*). Accordingly, the Massachusetts court upheld the respondents' condom policy.

This Court should grant review to resolve this square conflict on an important issue of federal constitutional law.

II. THIS CASE PRESENTS A PRECISE AND IMPORTANT, BUT UNSETTLED, QUESTION OF CONSTITUTIONAL LAW.

The premise of the decision below is simple: a public school that provides children with something their parents vigorously object to does not burden parental rights. In other words, a government school may defy parental wishes with constitutional impunity, so long as the students themselves are agreeable. While this Court has never approved such a flagrantly anti-parent rationale, the governing constitutional law remains unsettled. This Court should therefore grant review to resolve this issue.

The meaning of a constitutional "burden" represents a linchpin of constitutional analysis. In a huge variety of constitutional contexts, the threshold question is whether a challenged government action burdens some right. Whether

the asserted liberty be speech, religious freedom, privacy, association, property, or some other claimed right, the threshold inquiry remains the same: has the government burdened the exercise of the right? If this question yields an affirmative answer, a variety of constitutional tests can obtain: strict scrutiny, rational review, undue burden, and so forth. But if there is no burden, the constitutional analysis halts at the threshold.

In the present case, the state supreme court of Massachusetts has constructed an erroneously high threshold for constitutional claims. According to the court below, parents face no "burden" -- and thus can state no claims whatsoever -- unless their children are forced to participate in an objectionable program.[2] For this reason, the court held that

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2. Although the question is unsettled, the high threshold employed by the lower courts in this case is inconsistent with the lenity afforded by this Court to the scruples of students complaining of their mere exposure to invocations and benedictions at graduation exercises in public schools. *Lee v. Weisman*, 112 S. Ct. 2649, 2658 (1992) ("we have observed before [that] there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools") (citations omitted); *id.* ("[t]he undeniable fact is that the school district's supervision and control of a high school . . . places public pressure, as well as peer pressure, on attending students"); *id.* (public pressure and peer pressure "though subtle and indirect, can be as real as any overt compulsion"). Here, the courts below justified the judgments on the basis that there was no direct coercion of students to take or to use the schools' condoms. In the absence of direct coercion, the lower courts found no injury to the student petitioners' rights or to the parent petitioners' rights to control and direct the upbringing of their children. But this Court has rejected the sort of formalism

petitioners had failed to establish any claim of violation of parental rights or religious freedom.

This reasoning is badly flawed.

Parents have the constitutional right to direct the upbringing of their children. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Parental religious liberty includes the direction of their children's religious and moral upbringing. *Employment Division v. Smith*, 494 U.S. 872, 881 & n.1 (1990). Obviously, children will disobey at times, perhaps innumerable times. That is human nature. But when the government knowingly helps children defy their parents, that government burdens parental rights.

The constitutional question presented here is not what circumstances might justify government intervention in extreme cases, such as child abuse and neglect. Justification -- e.g., the evaluation of asserted government interests -- goes to the determination of whether the burden is constitutional or not. But the court below did not even begin to weigh the possible justifications (or lack thereof) in the present case.[3] Instead, the

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necessary to the conclusions reached below. In *Lee*, for example, the parties had stipulated that attendance at graduation is voluntary. *Id.* at 2659. Nevertheless, this Court concluded that such a formalistic assertion lacked "all persuasion[,]" and was "formalistic in the extreme." *Id.*

3. Once the burden on petitioners' rights is acknowledged, the courts below would have to address the sufficiency of the government's asserted interests in providing condoms to students regardless of parental objections. The state supreme court indicated

court below dismissed petitioners' challenge for failure to show a burden in the first place.

The implications of this rationale are enormous. Public schools would be free to provide students with everything from cigarettes, to syringes, to soft porn, to weapons instruction. So long as the school accommodated objecting students, that school could ignore objecting parents. Any students who chose to disobey parental commands would enjoy the school's cooperation in defying parental wishes. The fact that no student would be forced to accept anything would be no consolation -- and no constitutional balm -- for parents all too aware of the potential for childhood rebellion.

When a school helps students defy their parents, that school burdens parental rights. By holding to the contrary, the court below preempted full constitutional analysis and distorted the constitutional concept of a "burden" on rights. This Court should grant review to address and remedy this dangerous precedent.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and set the case for plenary review.

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that factual disputes over this matter may well preclude disposition by summary judgment. *See* App. 6a-7a & note 5.

Respectfully submitted,

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